No. 15203

# United States Court of Appeals

for the Ninth Circuit

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CLIFFORD O. BOREN,

Appellant,

vs.

R. A. RIDDELL, District Director of Internal Revenue,

Appellee.

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# Transcript of Record

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**Appeal from the United States District Court for the Southern District of California, Southern Division.**



Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9/21/56

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# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

TORRANCE & WANSLEY,
1216 Bank of America Building,
San Diego 1, California.

For Appellee:

LAUGHLIN E. WATERS,
U. S. Attorney,

EDWARD R. McHALE,
Asst. U. S. Attorney,
Chief, Tax Division,

BRUCE I. HOCHMAN,
Asst. U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

United States District Court, for the Southern District of California, Southern Division

Civil No. 1822—SD

CLIFFORD O. BOREN,

Plaintiff,

vs.

R. A. RIDDELL,

Defendant.

## COMPLAINT FOR PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

Comes now the plaintiff and for a cause of action against defendant alleges:

I.

This is an action of a civil nature arising under an act of Congress providing for Internal Revenue and this Court has jurisdiction thereof under the provisions of Section 1340 of Title 28 of the United States Code.

II.

Plaintiff is a citizen and resident of San Diego County, California.

III.

At all times subsequent to May 1, 1950, and prior to November 25, 1952, the defendant, R. A. Riddell, was the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California. At all times on and after November 25, 1952, said defendant was, and now is, the Director of Internal Revenue for the Sixth District of Southern California. Said defendant is a resident of the County

of Los Angeles in the Southern District of California. [2*]

IV.

This is an action to enjoin defendant R. A. Riddell from collecting or attempting to collect an alleged income tax deficiency, interest and penalties, for the calendar year 1951, which the Commissioner of Internal Revenue assessed against plaintiff on or about July 22, 1955. Said assessment is contrary to the provisions of Section 6212 of the Internal Revenue Code of 1954, and contrary to the provisions of Section 6501(a) of the Internal Revenue Code of 1954.

V.

On March 11, 1955, the Commissioner of Internal Revenue mailed an envelope by registered mail, addressed as follows:

"Mr. Clifford O. Boren,
"4511 Utah Street,
"San Diego, California."

This envelope contained a notice of proposed assessment of an alleged income tax deficiency, penalties and interest against plaintiff concerning the calendar year 1951. Said letter and notice is commonly known as the "90-day letter".

VI.

The address 4511 Utah Street was not plaintiff's address on March 11, 1955, the date of mailing. Plaintiff moved from said address on April 1, 1951 to Park Manor Hotel, 525 Spruce Street, San

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Diego, California. On April 11, 1952, plaintiff moved from said address to 6244 Perique Street, San Diego, California. Since April 11, 1952, the plaintiff's residence address has been and still is, 6244 Perique Street, San Diego, California. Since March 9, 1951, the plaintiff's business address has been, and still is, 4965 El Cajon Boulevard, San Diego, California.

VII.

Subsequent to March 11, 1955, and prior to April 14, 1955, the United States Post Office returned said envelope to the Commissioner undelivered.

VIII.

Plaintiff made and filed a Federal income tax return for the calendar year 1951 on or prior to March 15, 1952. The period within which the Commissioner of Internal Revenue could make a redetermination of the income tax liability of plaintiff for the calendar year 1951 expired on March 15, 1955. [3]

IX.

On or about April 14, 1955, by ordinary mail, the Commissioner mailed an envelope addressed as follows:

"Mr. Clifford O. Boren,
"4965 El Cajon Boulevard,
"San Diego 15, California,
"c/o Clifford O. Boren Contracting Company."

The envelope contained said notice of income tax deficiency, penalties and interest. The envelope was received by plaintiff on or about April 15, 1955.

X.

On or about July 22, 1955, the Commissioner assessed against plaintiff an income tax deficiency of $6,490.77 and penalties of $3,245.39 referred to in said notice of proposed deficiency, together with interest of $1,305.62. The total amount of the assessment was $11,041.78.

XI.

On March 11, 1955, when the Commissioner mailed said statutory notice, he had actual notice and knowledge of plaintiff's later addresses.

XII.

On or about May 11, 1954, plaintiff executed and filed with defendant a power of attorney, appointing certain persons as plaintiff's representatives, to represent plaintiff before the Treasury Department of the United States Government, in any matter involving plaintiff's federal income taxes. Said power of attorney commences as follows:

"Power of Attorney

"I, the undersigned, Clifford O. Boren, of 4965 El Cajon Boulevard, San Diego, California,"

On September 29, 1954, defendant acknowledged that said power of attorney was on file in defendant's office.

On or prior to March 15, 1954, plaintiff filed with defendant a declaration of estimated tax for the taxable year 1954 in which plaintiff's address was given as 6244 Perique Street, San Diego, California.

On or prior to March 15, 1954, plaintiff filed his income tax return with defendant for the calendar year 1953, in which it was stated that plaintiff's home address was 6244 Perique Street, San Diego, California. [4]

On or prior to March 15, 1953, plaintiff filed with defendant an income tax return for the calendar year 1952 in which he gave his business address, 4965 El Cajon Blvd., San Diego 15, California.

XIII.

During the course of their investigation to determine whether there were any income tax deficiencies concerning plaintiff's individual Federal income tax returns for the years 1950, 1951 and 1952, an agent, servant, employee and representative of the Commissioner of Internal Revenue spent many days during the years 1953 and 1954 examining plaintiff's bookkeeping and accounting records at his office located at 4965 El Cajon Boulevard, San Diego, California. The Commissioner did not mail the statutory notice of the proposed assessment of said income tax deficiency to plaintiff at his business address.

XIV.

On November 22, 1955, defendant, through his agent, servant, employee and representative, W. Howard Ferry, Jr., delivered to plaintiff's attorney a notice and demand in writing that plaintiff pay the amount of the assessments. Plaintiff is informed and believes, and therefore alleges the fact to be that on or about November 22, 1955 a warrant for

distraint was issued by defendant concerning said assessment.

XV.

Plaintiff is the owner of real and personal property situated within the Sixth Internal Revenue Collection District of California which is subject to distraint. Defendant R. A. Riddell has threatened, and is threatening, to distrain, seize and sell the property of plaintiff which may be found within said collection district and to apply the same or the proceeds thereof to the payment of the assessments. Unless restrained and prohibited by decree of this Court, defendant R. A. Riddell will levy upon, seize and sell plaintiff's property and will levy upon, seize and sell all other property which plaintiff may hereafter own or acquire within said collection district.

XVI.

Immediate and irreparable injury, loss and damage will result to plaintiff if defendant should levy upon, seize and sell plaintiff's property. [5]

Wherefore, plaintiff prays:

1. That this Court grant a preliminary injunction restraining and enjoining defendant, his agents, servants, employees, deputies and persons in active concert or participation with him, or any of them, from making any seizure, collection or distraint of any property belonging to plaintiff under the authority of said void assessment during the pendency of this action and until the final determination thereof.

2. That the Court determine the amount, if any, of security to be given by plaintiff, for the payment of such costs and damages as may be incurred or suffered by defendant if it is found that he has been wrongly restrained.

3. After the trial of this action, that the preliminary injunction be made permanent.

4. For costs of suit and such other and further relief as to the Court may be proper in the premises.

TORRANCE & WANSLEY,

By /s/ JOHN A. BRANT,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed December 15, 1955. [6]

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[Title of District Court and Cause.]

## NOTICE OF MOTIONS AND MOTIONS TO DISMISS

To the Plaintiff, Clifford O. Boren, and to Torrance and Wansley and John A. Brant, His Attorneys:

You, and each of you, will please take notice, defendant will call for hearing his motions to dismiss this action at 2:00 p.m. on Monday, April 16, 1956, or as soon thereafter as counsel can be heard, in the Courtroom of the Hon. Jacob Weinberger, United States District Judge, United States Customs and

Courthouse, 325 West "F" Street, San Diego, California.

Defendant moves the Court, as follows:

(1) To dismiss the action and grant judgment for defendant because the Court lacks jurisdiction over the subject matter of the action, said suit being barred by §7421 of the Internal Revenue Code of 1954.

(2) To dismiss the action and grant judgment for defendant because the complaint fails to state a claim against this defendant upon which relief can be granted. [8]

Said motions are based upon the pleadings, files, the affidavit of Forrest P. Calkins and Exhibit "A" thereto, and upon the Memorandum in Support of Motion to Dismiss attached hereto.

Dated: This 13th day of March, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK, and
BRUCE I. HOCHMAN,
Assistant U. S. Attorneys,

/s/ EDWARD R. McHALE,

Attorneys for Defendant
R. A. Riddell. [9]

## MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS

### Preliminary Statement

Defendant moves to dismiss the complaint on the grounds that the notice of deficiency and assessment were timely even though the factual allegations of the complaint be accepted as true in that the notice was not effectively mailed to the plaintiff until April 14, 1955. It is apparent from paragraph X of the Complaint that the penalty is exactly one-half of the tax and could only be the fraud penalty assessable under §293(b) of the IRC of 1939. However, since it is not clearly spelled out in the complaint that the assessment of tax and penalty is a fraud assessment, defendant has filed with this motion an affidavit attaching as Exhibit "A" thereto a true copy of the notice of deficiency mailed which clearly indicates the nature of the deficiency and penalty assessment as being for fraud under §293(b) of the IRC of 1939.

### Statement of Facts

Clifford O. Boren made and filed an income tax return for the calendar year 1951 on or prior to March 15, 1952. (Complaint, VIII) On or about April 14, 1955, the Commissioner of Internal Revenue mailed to the plaintiff a notice of proposed income tax deficiency, penalties and interest. Said notice was received by plaintiff on or about April 15, 1955. (Complaint, IX) Said notice of deficiency in tax, penalties and interest for the calendar year

1951 was based on the Commissioner's determining that the deficiency was due to fraud with intent to evade tax under §293(b) of the IRC of 1939 and the proposed penalty was 50% of the proposed amount of the deficiency asserted under said section. (Affidavit of Forrest P. Calkins, Exhibit "A"; Complaint, X) On July 22, 1955, the Commissioner assessed against Clifford O. Boren said proposed deficiency of taxes, penalties, and interest. (Complaint, X) [10]

## Question Presented

Whether the Commissioner properly assessed the tax, penalties and interest under §276(a) of the IRC of 1939 more than three years after the return was filed.

## Statutes Involved

Internal Revenue Code of 1939.

"§275. Period of limitation upon assessment and collection

Except as provided in section 276 ——

(a) General rule. The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period." 53 Stat. 86.

"§276. Same — Exceptions

(a) False return or no return. In the case of a false or fraudulent return with intent to evade tax

or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time." 53 Stat. 87.

"§293. Additions to the tax in case of deficiency

(b) Fraud. If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2)." 53 Stat. 88. [11]

"§3653. Prohibition of suits to retrain assessment or collection

(a) Tax. Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 53 Stat. 446.

Internal Revenue Code of 1954.

"§6212. Notice of deficiency

(c) Further deficiency letters restricted.

(1) General rule.—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213 (a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same tax-

able year, of gift tax for the same calendar year, or of estate tax in respect of the taxable estate of the same decedent, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical errors), or in section 6861(c) (relating to the making of jeopardy assessments)."

"§7421. Prohibition of suits to restrain assessment or collection

(a) Tax.—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax [12] shall be maintained in any court."

Argument

It may be stated at the outset that for the purposes of this motion only, defendant concedes that the propriety of the assessment of tax, penalties and interest must rest on the mailing of the notice of proposed deficiency on April 14, 1955, a period of more than three years after the return was filed and the assessment thereafter of the tax based thereon. Therefore, if §275(a) of the IRC of 1939 was applicable, this motion would not lie.*

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*In his complaint (para. IV), plaintiff mistakenly refers to §6501(a) of the IRC of 1954 as being applicable, whereas said section does not apply to taxes imposed by the 1939 Code. Int. Rev. Code of 1954, §7851(a)(6). Sec. 275(a) is the corresponding section of the 1939 Code.

However, §275(a) is not applicable. It may be easily inferred from the complaint itself that the proposed deficiency of tax, penalties and interest was for fraud since the penalty of $3,245.39 is 50% of the amount of the proposed deficiency of tax. It is not necessary for the Court to arrive at this by inference only, as the attached Exhibit "A" is a true copy of the notice of deficiency and clearly states that it is an assessment for fraud under §293(b) of the IRC of 1939.

That being so, the applicable limitations section is §276(a) of IRC of 1939 which states, "In the case of a false or fraudulent return with intent to evade tax * * * the tax may be assessed * * * at any time".**

The assessment being timely within said §276(a), this suit to restrain the collection of the tax is barred by §7421(a) of the IRC of 1954 (formerly §3653(a) of the IRC of 1939). Said section provides, "Except as provided in §6212(a) and (c), and 6213(a) no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court". The plaintiff does not allege and cannot allege any grounds for the circumvention of this sweeping statute. Cases denying such injunctions are legion. Some of the more recent Ninth Circuit cases are Los Angeles Soap Co., Inc.

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**Substantially the same provision was carried over into the 1954 Code as §6501(c)(1) and (2), but is applicable only to taxes imposed by the 1954 Code. Int. Rev. Cod of 1954, §7851(a)(6). [13]

v. Rogan, 14 F. Supp. 112 (S.D. Cal. 1936) (Yankwich, J.), appeal dismissed, 90 F. 2d 1012 (9th Cir. 1937); Noland v. Martin, 36 A.F.T.R. 1621 (S.D. Cal. 1947) (Weinberger, J.) aff'd sub nom. Noland v. Westover, 172 F. 2d 614 (9th Cir. 1949), cert. denied 337 U.S. 938.

In the few instances when the courts have granted injunctions restraining the assessment or collection of internal revenue taxes, extraordinary and exceptional hardship was a prerequisite to any kind of relief. Mere recitation of such conclusions as "irreparable injury" or "loss and damage" are not sufficient. Berry v. Westover, 70 F. Supp. 537 (S.D. Cal. 1947) (Weinberger, J.); Martin v. Andrews, —— F. Supp. ——, (S.D. Cal. 1955) (Hall, J.), 1955 Commerce Clearing House Stan. Fed. Tax Service, Para. 9615; 1955 P-H Fed. Tax Service, Para. 72,876.

Under the circumstances, the Court lacks jurisdiction over the subject matter and the complaint fails to state a claim upon which relief can be granted. If the Court considers it necessary to rely upon the affidavit and exhibit to show that the assessment is for fraud under §293(b) of the IRC of 1939, the affidavit and exhibit may be considered under Fed. R. Civ. P. 12(b) and 56.

## Conclusion

The complaint for injunctive relief to restrain the collection of taxes apparently is premised on the theory that the [14] assessment having been made

more than three years after the filing of the return, the collection is barred by §275(a) of the IRC of 1939. Since the assessment and notice thereof was for a filing of a false and fraudulent return with intent to evade tax, the notice of proposed deficiency and assessment could be made at any time and thus the assessment which was made was timely. Such being the circumstances, this action cannot lie to restrain the collection of the taxes, fraud penalties and interest. [15]

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[Title of District Court and Cause.]

## AFFIDAVIT OF FORREST P. CALKINS

United States of America,
Southern District of California—ss.

Forrest P. Calkins, being first duly sworn deposes and says:

(1) That he is a Technical Advisor, San Francisco Region, Internal Revenue Service, assigned by the Commissioner of Internal Revenue to assist the United States Attorney in the investigation and defense of the above-entitled action.

(2) That as such he had custody of the administrative file of the Internal Revenue Service dealing with the tax liability of the plaintiff for the calendar year 1951.

(3) That Exhibit "A" to this affidavit is a true copy of the administrative file copy of the "90-day

letter", the notification of proposed deficiency of income taxes and penalties for the calendar year 1951, the duplicate original of which was mailed by the defendant to the plaintiff on March 11, 1955, and again on or about April 14, 1955, as alleged in paragraphs V and IX of the Complaint herein. [16]

Further affiant sayeth not.

/s/ FORREST P. CALKINS.

Subscribed and sworn to before me this 13th day of March, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk United States District Court, Southern District of California,

By /s/ WAYNE E. PAYNE,
Deputy. [17]

EXHIBIT A

Form 1230

U. S. Treasury Department
Internal Revenue Service
District Director
Chief, Audit Division
P. O. Box 231 — Main Office
Los Angeles 53, California

June 29, 1955.

Mr. Clifford O. Boren,
4511 Utah Street,
San Diego, California.

Dear Mr. Boren:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1951 discloses a deficiency of $6,490.77 and $3,245.39 in penalty as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the

90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Chief, Audit Division, P. O. Box 231, Main Office, Los Angeles 53, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner,

By /s/ R. A. RIDDELL,
District Director of Internal Revenue.

Enclosures:
Statement
Form 1276
Agreement Form

PAK/hmg [18]

Statement

A:R:90D:PAK

Mr. Clifford O. Boren
4511 Utah Street
San Diego, California

Tax Liability for the Taxable Year Ended
December 31, 1951

| Year | Deficiency | 50% Penalty |
|---|---|---|
| 1951 Income Tax | $ 6,490.77 | $ 3,245.39 |

This determination of your income tax liability has been made on the basis of information on file in this office.

The 50% penality shown herein has been asserted in accordance with the provisions of Section 293(b) of the Internal Revenue Code of 1939.

Adjustment to Net Income
Taxable Year Ended December 31, 1951

| | |
|---|---|
| Net income as disclosed by return | $179,851.78 |
| Additional income: | |
| (a) Unreported business income | 7,211.96 |
| Net income adjusted | $187,063.74 |

Explanation of Adjustment

(a) It is determined that you realized taxable income during this taxable year from your business in the amount of $10,070.90 which was not included in the income reported in your return and that the deductions claimed for salaries and wages was overstated in the amount of $4,353.03. Your community one-half of the amount of these items, or $7,211.96, is added to the income reported in your return.

Computation of Tax
Taxable Year Ended December 31, 1951

| | | |
|---|---|---|
| Net income adjusted | | $187.063.74 |
| Less: Exemptions | | 1,800.00 |
| Balance, subject to surtax and normal tax | | $185.263.74 |
| Total surtax | $138.475.46 | |
| Total normal tax at 3% | 5,557.91 | |
| Total normal tax and surtax | | $144,033.37 |
| Correct income tax liability | | $144,033.37 |
| Income tax liablity shown on return, Account No. 271005740 | | 137,542.60 |
| Deficiency of income tax | | $ 6,490.77 |
| 50% penalty | | $ 3,245.39 |

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 13, 1956.

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[Title of District Court and Cause.]

## MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

### I.

### Jurisdiction

This Court has jurisdiction of this action under Section 1340 of Title 28 of the United States Code.

Slaven vs. U. S., et al.
(U.S.D.C. S.D. Calif. (Central) No. 14, 132-WB) October 21, 1952.

II.

Injunction

On a finding that the statutory notice of proposed assessment of income tax deficiencies, interest and fraud penalties was not mailed to taxpayer at his last known address as required by Section 6212 (b)(1) of the Internal Revenue Code of 1954, a preliminary injunction against distraint of property of the taxpayer should be granted pending a trial on the merits.

Slaven vs. U. S., et al.

(U.S.D.C. S.D. Calif. (Central) No. 14, 132-WB)

And after trial thereon, a permanent injunction should be granted.

Slaven vs. U. S., et al.
(U.S.D.C. S.D. Calif. (Central) No. 14, 132-WB) June 2, 1953.

Respectfully submitted,

TORRANCE & WANSLEY,

By /s/ JOHN A. BRANT,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed April 12, 1956. [22]

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 17, 1956

Present: Hon. James M. Carter,
District Judge.

Counsel for Plaintiff: John A. Brant.

Counsel for Defendant: Bruce I. Hochman.

Proceedings:

Hearing on Defendants' Motions to (1) dismiss & (2) for change of venue.

On motion of U. S. Attorney, it is ordered that motion for change of venue be waived.

Att'y Brant, for plaintiff, and Ass't. U.S. Att'y Hochman both make statements.

Court orders that that plaintiff and defendant file briefs re question of notification by registered mail requirement of the Act, said briefs to be filed by plaintiff on or before April 24, 1956, and reply brief of defendant by April 30, 1956.

Defendant to file a motion for summary judgment.

It Is Ordered that hearing on these matters be continued to 2:00 p.m., April 30, 1956.

JOHN A. CHILDRESS,
Clerk;

By L. CUNLIFFE,
Deputy Clerk. [24]

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 30, 1956

Present: Hon. James M. Carter,
District Judge.

Counsel for Plaintiff: Torrance & Wansley, John A. Brant.

Counsel for Defendant: Bruce I. Hochman, Assistant U. S. Attorney.

Proceedings:

Hearing Motion of Government to Dismiss and Motion for Change of Venue.

Attorney Hochman withdraws motion of Government for change of venue. Counsel argue motion of Government to dismiss.

It Is Ordered that motion of Government to dismiss be deemed as a motion for summary judgment and said motion is granted. Government to draw findings of fact, conclusions of law and formal judgment within 10 days. Attorney Brant moves for injunction pending appeal under Rule 62c. Court directs counsel to make formal motion after formal judgment is entered. Attorney Hochman states Government will not proceed until judgment entered or said motion for injunction is made.

JOHN A. CHILDRESS,
Clerk;

By E. M. ENSTROM, JR.,
Deputy Clerk. [25]

[Title of District Court and Cause.]

## DEFENDANT'S REPLY MEMORANDUM

### Preliminary Statement

Originally the question presented was delimited to whether or not the assessment of the Commissioner was proper being more than three years after the return was filed. The propriety of this action was defended in the defendant's memorandum in support of motions to dismiss; it appears that no controversy persists as to that point.

### Statement of the Facts

Both parties agree as to the facts of the basic question remaining.

On March 11, 1955, the Commissioner sent a Notice of Deficiency (90-day letter) to the plaintiff by registered mail. This was returned. On April 14, 1955, the Commissioner remailed a Notice of Deficiency to the plaintiff by ordinary mail. Admittedly it was received by the plaintiff on April 15, 1955. [26]

### Statement of the Issue

Is the Government correct in its contention that injunctive relief does not lie for the plaintiff: i.e., that the assessment was proper or in the alternative the plaintiff did not exhaust his administrative remedies for the determination of its propriety?

Argument

Quite a few courts have considered matters on the periphery of the problem of the case at bar, but the latest appellate decision and the only one which squarely considers the statutory requirement of notice to the taxpayer is Dolezilek v. Commissioner, 212 F 2d 458, (D.C. Cir. 1954).

In that case, the Court of Appeals was reviewing an order of the Tax Court dismissing a petition on the grounds of lack of jurisdiction because of the alleged expiration of the statutory 90-day limitation.

On March 11, 1952, the Commissioner mailed to the taxpayer by registered letter a statutory notice of deficiency. It was refused and, therefore, not received. On April 25, 1952, a deputy collector served the notice of deficiency personally on the taxpayer. The petition to the Tax Court was filed more than 90 days after the letter was mailed though less than 90 days after the manual delivery of the notice. The court held at page 459: "We hold, therefore, that where a taxpayer receives actual notice of deficiency during the 90-day period, and has adequate time remaining within that period for preparing and filing his petition, he is not entitled to compute the period from a date other than of mailing."

The dissent casts even further light on this problem of notice. The Judge disagreed with his brethren in that he felt that the taxpayer should have 90 days aftere the actual delivery within which to file a petition to the Tax Court. However, he pointed out

that the statute does not forbid manual delivery and the use of registered mail is not made exclusive. The purpose of the notice [27] basically is that the taxpayer receives notice—there is no magic in the words "registered mail."

It appears that this case, more than any other, reveals a proper interpretation of the statute and an understanding of the terms "notice" and "registered mail." At page 462 of the Dolezilek opinion, the dissenting Judge quotes from Commissioner v. Steward, 186 F. 2d 239 at page 241 and states: "If the taxpayer receives notice of the proposed assessment and during the 90-day period thereafter files a petition for review with the Tax Court, the purposes of the act have been accomplished."

The cases cited by the plaintiff are distinguishable:

(1) Welch v. Schweitzer, 106 F. 2d 885 (9th Cir. 1939). The extension of time obtained by the Bureau of Internal Revenue was predicated upon a condition precedent, i.e., that the taxpayer be notified by registered mail if there be any notice of deficiency. It was mandatory. It was not merely that the Commissioner was authorized to use registered mail. By contract the parties went beyond the statute. This is borne out by the findings of fact and conclusions of law of the District Court reported in Schweitzer v. Welch, 24 AFTR 1110 (case was not reported in Fed. Supp.).

(2) Ventura Consolidated Oil Fields v. Rogan, 86 F. 2d 149 (9th Cir. 1936). In this case, the assess-

ment was made within the 60-day period and for that reason was faulty. In the case at bar, no such assessment within the statutory time for petitioning to the Tax Court was accomplished.

(3) Van Antwerp v. United States, 92 F. 2d 871 (9th Cir. 1937). This case has no issue germane remaining to the case at bar.

(4) Maxwell v. Campbell, 205 F. 2d 461 (5th Cir. 1953). In this case, no notice of deficiency was ever received by the taxpayer.

Part of the difficulty in interpreting the meaning of §272 (a) (1) of the Internal Revenue Code of 1939 is that many of the [28] cases involve issues outside of its purview. The language indicates that the Commissioner "is authorized to send notices of such deficiencies to the taxpayer by registered mail." Note that the word "authorized" is a permissive word at most. By this we mean that if the Commissioner employs this method of sending notices he is certain to be correct; it does not mean that he must serve a notice of deficiency by registered mail.

The Ninth Circuit cases do not assist the Court in determining the rights of the plaintiff under this case. Rather, the Dolezilek case is the one which is squarely in point. Congressional intent is vindicated. Notice to the taxpayer was the prime concern of Congress; the manner is not mandatory.

Counsel for plaintiff has concluded that the Government's argument about exhaustion of adminis-

trative remedies is "specious." Nothing could be farther from the truth. The doctrine of administrative remedies has been enunciated in man cases. Among these are United States v. Edward Valves, Inc., 207 F. 2d 329 (7th Cir.) Cert. denied, 22 L. W. 3250, April 5, 1954; McCauley v. Waterman Steamship Corp., 327 U.S. 540.

Applied to the case at bar, it means simply this: The plaintiff must petition the Tax Court and have that Court determine whether or not it has jurisdiction. If the Tax Court decides it has no jurisdiction because the plaintiff did not petition it in time, then, of course, the taxpayer would be penalized for his procrastination. If ever the Tax Court were to decide that it has no jurisdiction because the notice of of deficiency was defective and, therefore, the assessment was defective, then the Government could appeal it or issue a new assessment. If it endeavored then to distrain on the assessment which would be defective, this injunction suit could be pressed. Otherwise, this Court would be usurping the function of the Tax Court. [29]

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax Division:

ROBERT H. WYSHAK, and
BRUCE I. HOCHMAN,
Assistant United States
Attorneys;

/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 30, 1956. [30]

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United States District Court, for the Southern District of California, Southern Division

No. 1822—SD-C Civil

CLIFFORD O. BOREN,

Plaintiff,

vs.

R. A. RIDDELL,

Defendant.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled action came on regularly for hearings on April 17, 1956 and April 30, 1956 on defendant's Motion to Dismiss, before the Honorable James M. Carter, United States District Judge, presiding, sitting without a jury; the plaintiff, appearing by his attorneys, Torrance & Wansley by John

A. Grant, Esq., and the defendant, R. A. Riddell, District Director of Internal Revenue, Los Angeles District, appearing by his attorneys, Laughlin E. Waters, United States Attorney for the Southern District of California, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, Robert H. Wyshak and Bruce I. Hochman, Assistant United States Attorneys for said District, and the cause having been submitted upon the pleadings, affidavits, memoranda of law and oral arguments with the Court treating the motion to dismiss as a motion for summary judgment under Federal Rule of Civil Procedures 12(b), being duly advised, having made an order for findings of fact, conclusions of law and judgment, now makes its Findings of Fact, Conclusions of Law and Judgment as follows: [32]

Findings of Fact

I.

Plaintiff made and filed a federal income tax return for the calendar year 1951 on or prior to March 15, 1952.

II.

On March 11, 1955, the Commissioner sent a Notice of Deficiency (90-day letter) to the plaintiff by registered mail. Said notice recited that the plaintiff had a deficiency for the calendar year 1951 of $6,490.77 income tax and $3,245.39 in penalty. The penalty of $3,245.39 is 50 per cent of the deficiency and is fraud penalty asserted in accordance

with the provisions of §293(b) of the Internal Revenue Code of 1939.

III.

The Notice of Deficiency was returned by the Post Office Department because the plaintiff had moved. At the time of the March 11, 1955 mailing to the old address, the Commissioner had actual notice and knowledge of plaintiff's new address.

IV.

On April 14, 1955, the Commissioner remailed the Notice of Deficiency to the plaintiff's correct address by ordinary mail. The plaintiff admits receiving this notice on April 15, 1955.

V.

On July 22, 1955, the Commissioner of Internal Revenue assessed against plaintiff an income tax deficiency of $6,490.77 and penalties of $3,245.39 referred to in said Notice of Deficiency, together with interest of $1,305.62. The total amount of the assessment was $11,041.78.

VI.

On November 22, 1955, defendant through his agent, servant, employee and representative, W. Howard Ferry, Jr., delivered to plaintiff's attorney a notice and demand in writing that plaintiff pay the amount of the assessment. On November 22, 1955, a warrant for distraint was issued by defendant concerning said assessment. [33]

VII.

Plaintiff is the owner of real and personal property situated within the Sixth Internal Revenue Collection District of California which is subject to distraint. Defendant R. A. Riddell has threatened, and is threatening, to distrain, seize and sell the property of plaintiff which may be found within said collection district and to apply the same or the proceeds thereof to the payment of the assessments. Unless restrained and prohibited by decree of this Court, defendant R. A. Riddell will levy upon, seize and sell plaintiff's property and will levy upon, seize and sell all other property which plaintiff may hereafter own or acquire within said said collection district.

VIII.

The plaintiff did not file a petition for redtermination of the deficiency with the Tax Court of the United States within 90 days of the mailing of April 14, 1955, and to the date of this action has never filed such a petition with the Tax Court. The plaintiff still has an opportunity to contest the deficiency assessment, penalties and interest on the merits by paying said taxes and administratively filing a claim for refund before pursuing his legal remedies in the federal district court or the Court of Claims.

Conclusions of Law

I.

The Notice of Deficiency mailed by registered mail to the plaintiff on March 11, 1955 and returned

to the Commissioner's delegates because it was incorrectly addressed was of no legal efficacy as a notice under § 272(a)(1) of the Internal Revenue Code of 1939.

II.

The Notice of Deficiency mailed by ordinary mail to the plaintiff on April 14, 1955, and admittely received by him on April 15, 1955, is a proper notice and was timely given for the reason that a fraud penalty under § 293(b) of the Internal Revenue Code of 1939 was alleged. Said fraud penalty and the deficiency assessment upon which it is predicated is not barred by a three year statute of limitations.

III.

The Notice of Deficiency having been timely [34] and properly given to plaintiff and plaintiff having failed to petition the Tax Court of the United States for a redetermination of said deficiency within 90 days of said mailing of notice on April 14, 1955, the assessment of taxes of $6,490.77, penalties of $3,245.39, and interest of $1,305.62, for a total of $11,041.78 by the Commissioner of Internal Revenue on July 22, 1955, was lawful and proper and the enforcement or collection of said assessment cannot be enjoined.

IV.

The plaintiff has failed to exhaust his administrative remedies in that no petition for a redetermination of the deficiency together with the penal-

ties and interest involved was filed with the Tax Court of the United States within 90 days of the mailing of April 14, 1955.

V.

The plaintiff still has an opportunity for contestting the deficiency assessment, penalties and interest on the merits by paying same and administratively filing a claim for refund before pursuing his legal remedies in the federal district court or the Court of Claims.

VI.

Defendant is entitled to judment that the complaint be dismissed with prejudice, that the injunction be denied, and that the defendant have his costs.

Judgment

This matter having come before the Court on motion of defendant to dismiss, which has been treated by the Court as a motion for summary judgment under Federal Rule of Civil Procedures 12(b), and based on the pleadings, affidavits, memoranda of law and oral arguments, and the Court having duly considered the same, it now makes its judgment as follows:

It Is Hereby Ordered, Adjudged and Decreed that the defendant is entitled to judgment, that the complaint be dismissed with prejudice, that the prayer for injunction be denied and with costs of defendant in the sum of $20.00 to be taxed by the Clerk of the Court.

Dated: This 8th day of May, 1956.

/s/ JAMES M. CARTER,
United States District Judge.

Lodged May 7, 1956.
[Endorsed]: Filed May 8, 1956.
Docketed and entered May 10, 1956.

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Clifford O. Boren, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from a final judgment entered in this action on May 10, 1956.

Dated: June 1, 1956.

TORRANCE & WANSLEY,
By /s/ JOHN A. BRANT,
Attorneys for Plaintiff.

[Endorsed]: Filed June 7, 1956. [36]

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[Title of District Court and Cause.]

NOTICE OF MOTION FOR INJUNCTION PENDING APPEAL

To Defendant R. A. Riddell, and to Laughlin E. Waters, United States Attorney; Edward R. McHale, Assistant United States Attorney; Robert H. Wyshak, Bruce I. Hochman, Assistant United States Attorneys; his Attorneys:

Please Take Notice that on Monday, the 18th day of June, 1956, at 10:00 o'clock a.m., or as soon

thereafter as counsel can be heard, plaintiff will move the above-entitled Court in the courtroom of Honorable James M. Carter, United States District Judge, United States Customs and Courthouse, 325 West "F" Street, San Diego, California, for an order restraining and enjoining defendant, his agents, servants, employees, deputies and persons in active concert or participation with him, or any of them, from making any seizure, collection or distraint of any property belonging to plaintiff under the authority of the assessment referred to in the complaint on file herein, during the pendency of plaintiff's appeal, and fixing the amount of bond, if any, for the security of the rights of defendant.

Said motion will be based upon this Notice of Motion, the pleadings, files and records in this action.

Dated: June 4, 1956.

TORRANCE & WANSLEY,

By /s/ JOHN A. BRANT,

Attorneys for Plaintiff.

Points and Authorities:

Rule 62(c) Federal Rules of Civil Procedure.

[Endorsed]: Filed June 7, 1956. [37]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JUNE 18, 1956

Present: Hon. James M. Carter,
District Judge.

Counsel for Plaintiff: John A. Brant.

Counsel for Defendant: Howard R. Harris.

Proceedings:

Hearing on plaintiff's Motion for Injunction pending appeal.

It Is Ordered that plaintiff's attorney file reporter's transcript.

It Is Further Ordered that bond for plaintiff pending appeal be set in the amount of $12,000.00 (Twelve Thousand Dollars).

JOHN A. CHILDRESS,
Clerk.

In the United States District Court Southern District of California, Southern Division

Civil No. 1822-SD-C

CLIFFORD O. BOREN,

Plaintiff,

vs.

R. A. RIDDELL,

Defendant.

Honorable James M. Carter, Judge Presiding.

## REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:
TORRANCE & WANSLEY, by
JOHN A. BRANT;

For the Defendant:
LAUGHLIN E. WATERS,
United States Attorney, by
BRUCE I. HOCHMAN.

Tuesday, April 17, 1956; 2:00 P.M.

The Court: Call the civil matter.

The Clerk: Item No. 15 on the calendar, 1822 SD-C, Clifford O. Boren versus R. A. Riddell. One, hearing motion to dismiss; two, motion for change of venue. John A. Brant for the plaintiff and Bruce I. Hochman for the government.

Mr. Brant: Ready for the plaintiff.

Mr. Hochman: Ready for the government.

The Court: I understand that the government waives its motion for change of venue.

Mr. Hochman: That's right, your Honor.

The Court: Mr. Brant, the memorandum of points and authorities that you filed consisted of referring to a case filed in the Los Angeles area which is unreported and not available for me here. Is that the only law you could find to support your position?

Mr. Brant: No, your Honor. That case contains —I was unable to find any official citation for it. Is it located in the unofficial reports. It does not— is not officially reported. It is a case very similar to the case now before the court and I felt the closest case in point, to consider specifically the important issue of whether or not irreparable damage would be incurred by the taxpayer in this case if an injunctive relief is not available.

The Court: Was there an opinion written by the Judge?

Mr. Brant: Yes, your Honor.

The Court: Must have been a memorandum, never published.

Mr. Brant: Published unofficially but I could not find any official citation but only an unpublished citation. The first one was concerned with a preliminary injunction and the second one sometime later granted a permanent injunction on a summary judgment. I have the unofficial report of the case in my office which I will be happy to make available.

The Court: Well, if what you say about the case is true there is apparently no notice—no correct notice was ever mailed to the taxpayer in that case.

Mr. Brant: That is the essence of my position, your Honor, that on April 14, 1955, a notice was mailed to the taxpayer but by unregistered mail and as a result there is no effective notice at this time.

The Court: Now wait. You admit that he got the notice.

Mr. Brant: I admit that he received a notice mailed by ordinary mail and on first impression the objection which I am now making seems to be of no great importance. However, the United States Tax Court has repeatedly and consistently held that where a notice is given by ordinary mail or in any other manner other than registered mail the tax court has no jurisdiction even in circumstances where as here originally the Commissioner mailed it by registered mail. And when it [3*] didn't arrive because it was improperly addressed he remailed it by ordinary mail. The tax court holds that is insufficient to give them jurisdiction.

The Court: That is in cases where there is a contention the mail was never received.

Mr. Brant: No, your Honor——

The Court: Even in cases where there is an admission that the mail was received?

Mr. Brant: Yes, sir. I have Oscar Block, 2 T.C. 761; and in that case the Commissioner himself after the taxpayer had finally received the notice

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

and came into court—this is independant of the statute of limitations point brought up by the government—where the taxpayer came into the tax court on a petition for redetermination the Commissioner himself contended that the tax court was without jurisdiction and the tax court so held. I have a rather extensive quotation from this case which shows the Court considered these very points, your Honor. I would like to hand the quotation to your Honor.

The Court: What did they base it on? Some statute? Certainly no logic in it. In other words, if a law said that I had to give you notice by registered mail and I went around and handed it to you and you conceded to the court that you received the notice, it would be silly to say that some procedure said it had to be sent by registered mail.

Mr. Brant: I agree, your Honor. But the Code says [4] registered mail is necessary. The tax court has limited jurisdicition and requires strict and absolute adherence to the rule.

The Court: Now, the Code says as far as the tax court is concerned registered mail is required?

Mr. Brant: The Code authorizes the Commissioner to send a notice of deficiency to a taxpayer by registered mail. He has no authority other than that and the cases have so held.

The Court: What section is that?

Mr. Brant: I can give that to your Honor. Just one moment. Section 272(a) of the Internal Revenue Code of 1939, in which it states:

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency

> in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail."

and the tax court has repeatedly held, your Honor, as indicated in the memorandum which I have handed up to the Court, that this is a jurisdictional requirement.

The Court: That section again in the 1939 Code?

Mr. Brant: That is the '39 Code. The similar provision in the 1954 Code, your Honor, is Section 6213.

The Court: 1939 Code. And what's the section number?

Mr. Brant: 272(a) parenthesis one. Small a, parenthesis [5] one.

The Court: Carried over verbatim in the '54 Code?

Mr. Brant: As I recall, your Honor, it was except this particular section was broken down into more than one heading.

The Court: You said 6213. It is 6212 in the '54 Code, is it not?

Mr. Brant: My notes——

The Court: Referring to "the Secretary or his delegate determines that there is a deficiency in respect of any tax" and so forth "is authorized to send notice of such deficiency to the taxpayer by registered mail."

Mr. Brant: That is correct, your Honor.

The Court: 6212, subdivision a.

Mr. Brant: My notation here referred to the injunctive relief aspect of that original section, your Honor. My apologies.

The Court: Well, of course, this tax court decision you have referred me to, Oscar Block, 2 Tax Court 761, was a question of the running of the ninety-day period after the mailing.

Mr. Brant: Your Honor, here we have—pardon me.

The Court: Here you have a situation where if this is a fraud penalty there is no statutory period.

Mr. Brant: Your Honor, it is not that statutory period. The fraud penalty refers to the statute of limitations for [6] any assessment. The statutory period here involved is the ninety-day statute. The one involved in the Oscar Block case is the ninety days permitted to the taxpayer to petition the tax court for redetermination. That is a condition precedent to a valid assessment by the Collector of Internal Revenue and the discussion with reference to the ninety-day letter in the Block case is the identical situation which we have here.

The letter apparently was mailed by registered mail in March of 1955 and then later in April by ordinary mail.

The Court: You are familiar with this and you are skipping things that you may be familiar with that I do not see. If I can guess what your position is—since you are not telling me—is your position that you would have petitioned the tax court for a redetermination had you received a registered letter?

Mr. Brant: Our position, your Honor, is that the tax court—in view of the manner we received this notice by ordinary mail these decisions of the tax court hold that the tax court has no jurisdiction to hear and determine the petition. Now, our position is essentially this: That if the government is right in their assertion of fraud, they can at any time issue a proper notice of deficiency and this, as a matter of fact, has been suggested to the government. They can right here today, tomorrow or any time issue a new ninety-day letter to the taxpayers and send it to them—to the taxpayer [7] and send it to him by registered mail and then we would be able to petition to the tax court for a redetermination. But under the notice which he did receive the cases specifically state, as in the Oscar Block case, that the tax court does not have jurisdiction and in most of these cases the commissioner himself has asserted the lack of jurisdiction—in some of them the tax court itself also has determined on its own motion that it had no jurisdiction.

The Court: Your point is that you want to petition the tax court?

Mr. Brant: That is correct.

The Court: And you have not done so?

Mr. Brant: And we have not done so.

The Court: Is there anything in the file? You allege that in the complaint?

Mr. Brant: We show in the complaint the insufficiency of this notice of proposed deficiency.

We have shown in the complaint that the necessary elements for a proper notice of deficiency do not exist. We also show in the complaint that the Collector of Internal Revenue is now seeking to levy upon real and personal property in this area belonging to the taxpayer and we allege irreparable damage from that.

The Court: Do you allege anywhere that you want to avail yourself of a remedy for petitioning the tax court?

Mr. Brant: No, your Honor.

The Court: You don't have—you have an ultimate remedy. [8] You can go either route in these matters. Pay your money under protest and sue in our District Court or go the tax court route and not pay the money. Do you allege in the complaint that you are not interested in going the tax court route?

Mr. Brant: We have not made that allegation. No; here is the point, your Honor. If the notice of deficiency has not complied with the statutory limitation the notice of deficiency is void, void just as if no notice of deficiency had been issued. It is clear from the tax court cases that that is the necessary result of the notice of deficiency. Since it was not sent by registered mail the notice is invalid. And I have got other tax court decisions I could give you if you care to examine them. The notice is absolutely invalid and we're placed in this position, your Honor, that we are prejudiced in this point. We have no speedy and adequate remedy except now to permit the Collector to collect the tax from

the property or pay him and file a claim for refund and wait the requisite period. We have been deprived of—essentially by this faulty notice, we have been deprived of a redetermination by the tax court of the United States.

The Court: You tell me that but you don't say that in the complaint.

Mr. Brant: No, sir. We have not alleged that.

The Court: One thing to tell me what you have been deprived of. It is another thing to set forth in a complaint [9] some cause of action based upon that matter. In other words, you may have a point here but it is very obviously an after thought. It was not briefed in your memorandum. It is not set forth in your complaint. And now as an afterthought you raise this point.

Mr. Brant: May I make a short statement on that, your Honor?

The Court: Yes.

Mr. Brant: I was under the impression that we were going to hear the motion for change of venue until just the tail end of last week when I wrote your Honor a letter. Of course, we have no defense to a motion for change of venue if the government had wished to pursue the matter. I assumed myself we would not get to the hearing of this motion until the matter was transferred back to the Central Division and the matter reheard.

I would be happy, if the Court would permit me to do so, to file a memorandum on this entire question.

The Court: Well, maybe that's the thing to do—

let's look your complaint over here. You actually allege in the complaint that you received the notice.

Mr. Brant: That is correct but by ordinary mail.

The Court: Yes. No dispute about that. You received the notice on April 15th and alleges over ninety days on July 22nd the Commissioner made the assessment. [10]

Mr. Brant: That's correct, and that assessment was an ex parte act on his part.

The Court: That is right. It is now your contention that you cannot contest that assessment in the tax court.

Mr. Brant: It is my contention also and now at the time we received the notice and at any time thereafter we could not effectively petition the tax court because the tax court has held under these circumstances it has no jurisdiction.

The Court: Must the proceedings of the tax court be started before the Commissioner makes an assessment?

Mr. Brant: After one, an effective valid notice of deficiency has been mailed to the taxpayer by registered mail and two, before the expiration of ninety days, your Honor, but the registered mail requirement is a jurisdictional, requirement according to the cases.

The Court: According to the tax court?

Mr. Brant: Also, and it is a condition precedent to a valid assessment, your Honor, unless the Commissioner makes a so-called jeopardy assessment which I understand has not been made in this case.

I don't believe the government will contend a jeopardy assessment was made here. And also Section 272 of the 1939 Act specifically gives this court jurisdiction to enjoin collection or distraint where a valid notice of deficiency has not been mailed to the taxpayer. So it seems clear that a proper notice is a matter of the greatest importance [11] otherwise the taxpayer has no remedy before the tax court.

The Court: Isn't a remedy available to you to get into the tax court?

Mr. Brant: Jeopardy assessments are an entirely different matter. That is not here involved. But in the normal course of events on a matter of this type once the assessment has been made that is the final act and the only approach the taxpayer has is to come into the District Court under this Code section seeking an injunction, as we have done, or pay the tax and file a claim for refund with the commissioner and wait a six-months' period and either file a suit for a refund in this court or in the United States Court of Claims. Those are the remedies which are available. But as we now stand the Collector is about to levy—he has already levied upon and he is about to sell the assets of the taxpayer to collect the tax. The notice of deficiency itself, your Honor, clearly shows that its primary purpose is to inform the taxpayer of his right to petition for a redetermination and, of course, without complying with the statute that was of no avail whatsoever.

The Court: You are not urging the point about

the three-year statute of limitations? You are content with the government's showing on that?

Mr. Brant: I am not content with the government's [12] showing. I have doubt as to whether or not your Honor is going to take into consideration the affidavit which was filed.

Now, I'm somewhat confused about that. As I understand the rules it becomes a motion for summary judgment if that occurs.

The Court: That is my understanding of the rules.

Mr. Brant: And that we should then have the opportunity as should the government to make a real motion for summary judgment out of it.

The Court: That is my understanding of the rules. If you rely upon something dehors the record, then actually it is a motion for summary judgment. Now, what a motion is called doesn't make any difference. The only point there would be if you thought you had any ground to resist the motion and wanted to make any showing contrary to what the government has made, why I would give you time to do it. However, there doesn't seem to be much dispute about that part of the motion. However, it does not answer the point you raise now.

Mr. Brant: There is only one dispute I would raise to that. The provisions of 1112 of the '39 Code or Section 7454 of the '54 Code provide as follows:

> "In any proceeding involving the issue whether the petitioner has been guilty of fraud——"

I believe that should be taxpayer—— [13]

> "with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner."

That was the original language of it and now the language provides the burden shall be upon the Secretary or his delegate and it would be my position that in a motion for summary judgment the government would bear the burden to show on a summary judgment there was fraud in order to overcome the statute of limitations.

The Court: We are not trying the case. That section talks about the burden of proof on the trial. The only thing that would be involved on a motion for summary judgment is what kind of a notice was sent you. Now, if it was a notice in which the government was relying upon fraud at the trial thereof the burden of proof might well be on the government. As far as the notice that was sent, you do not dispute this was the notice that was sent?

Mr. Brant: No, your Honor. But I do make this one point. Assuming that the notice is not defective from the standpoint of mailing, the notice is valid only if fraud exists, in other words, only if the statute of limitations is suspended because of the fraud. Now, it has been held in numerous cases —and I don't think there is any dispute whatsoever on this—where the government is relying on fraud to overcome the statute of limitations they likewise, to overcome that, must bear the burden of [14] proof.

The Court: You mean we would have to have a trial now and find out whether the government had some fraud to prove?

Mr. Brant: To overcome the statute of limitations. Frankly, it would appear that way. It seems to reach that conclusion. I don't know.

The Court: It does not cut off your trial on the merits of the case if you lose this injunction proceeding. You still have a chance to have your day in court on your tax problem. Let's forget your other point for a minute. For argument assume you waived the right to go the tax court route. You still have the right to pay your taxes under protest, sue for them and have your day in court on taxes. And in that trial the issue of the burden of proof for the government could well come up. All the decision here does is cut you off on the right of an injunction.

Mr. Brant: That is correct.

The Court: Do you think the government, in order to defeat your injunction action, must came in and put on a case and prove your fraud?

Mr. Brant: To me it doesn't follow they should be required to do so; when you examine the cases on the statute of limitations it appears that might be the conclusion. I am not asserting that point.

The Court: I am going to treat the motion of dismissal, in view of the affidavit in support, as a motion for summary [15] judgment. If either side wants to proceed with it, I want the government to comply with the rules concerning motions for summary judgment, set forth a proposed set of findings

of fact and conclusions of law and a proposed judgment showing the uncontroverted facts and the defendant to comply with that rule, must make a showing to the Court as to what facts he contests that have been made by the government's showing and what points, what facts there are in issue that will require trial. And I will give you each time on that to pursue that matter further. That however, involves largely the question of the three-year statute of limitations.

Mr. Brant: Yes, sir.

The Court: Now, on this other point, that is, the new point—that is a different point—you want to be heard on it, Mr. Hochman?

Mr. Hochman: Several things occur to me, your Honor. First of all, granting everything Mr. Brant has said, I don't think this Court is bound by it. You still have the administrative processes to follow and exhaust and I don't think it would be incumbent upon this Court to constitute itself a tax court and consider the matter as if it were a tax court. This citation of 2 T.C.—whatever it be—761, Oscar Block, was quite sometime ago. There is no Circuit authority. I think this is true in this case. I'm perhaps speculating but it looks this way to me in any event. The taxpayer let his [16] time go by and then woke up with this realization. In the tax court it is just a matter of trial strategy, it being incumbent upon the government, because the statute of limitations has expired to carry the burden not only for the fraud penalty but also to the extent of the assessment itself because the assessment

would rise or fall with the proof of the fraud. Not so in a District Court suit for refund. There the plaintiff taxpayer would have the burden of proof and I will confess it is a much harder lawsuit. But it is something which I believe that the taxpayer——

The Court: Wins most of them.

Mr. Hochman: For one thing they win but it is a harder lawsuit to try.

The Court: They win more. They have won most of them they have tried before juries in my court, when they go to the District Court about it.

Mr. Hochman: Perhaps so and perhaps——

The Court: That is not the point.

Mr. Hochman: I think Mr. Brant's bombs—Mr. Brant is spinning forth an ingenious thought.

The Court: It was an ingenious thought. It is something that came after he read your brief, it is pretty obvious to me. The thought is that since a sections says this assessment must be made by registered mail, 6212, that therefore since it was not made by registered mail, in view of what he claims, [17] there is no way to get into the tax court. Therefore, he has never had a right to avail himself of one of the remedies that should be available to him and he has never had that right because of the government's fault. Now there may be holes in that argument. Maybe this is not the law of the tax court. Maybe it is not the law of the Circuit. Certainly there is a serious question as to whether the complaint states a cause of action for relief

upon that ground. I am trying to go through the complaint to see if that ground is stated. Paragraph IV says in part:

> "* * * Said assessment is contrary to the provisions of Section 6212 * * *"

It does not say how. But let's skip that for a minute. And then it says "6501(a)" which of course is a statute of limitations problem. Then he alleges this mismailing that went on. He alleges nowhere that he desired to proceed in the tax court. Alleges nowhere that he has lost his right to proceed in the tax court and finally he states in Paragraph XVI, one line sentence, about irreparable injury, loss and damage, which I suppose should be read with Section XV. But nothing said about why he cannot pursue his remedy of paying the taxes and then suing to recover them. You have a point here which has not been briefed. Counsel has handed me a Block case abstract. You have not had a chance to look at it.

Mr. Hochman: Assuming though that this is true, assuming [18] though that this law of the Block case is law and there will be assumed there are no other cases on the subject, we have this interesting point of the exhaustion of the administrative remedies, he still must give the tax court a chance to say "we don't have jurisdiction." Now, interestingly enough, the Commissioner is in this position: The Commissioner cannot make this assessment while the taxpayer within those ninety days after the Commissioner's own notice has peti-

tioned the tax court in Washington, D. C. In that period of time the Commissioner cannot make an assessment. At the time the tax court then kicks out the taxpayer. At that time if the Commissioner makes an assessment, he can stop them and say you never gave me the right notice. I think that is the determination of the tax court because the Commissioner's arms are bound until the tax court itself says to the taxpayer—and that's what 6215 goes on to say. The Commissioner is bound until the tax court disposes of it.

Let us say he went within the ninety days and the tax court says Mr. Block, in the Block case, we have no jurisdiction, I'm sorry—Mr. Boren in this case—you cannot petition here. Then he comes into this court and points out the fact he never had his day in court for the reason that that very notice is faulty. Your Honor, I think we are precluding the tax court from saying "by registered mail." 6212—not repeated by the way in 13 or 14. It is a silly rule. It [19] protects the taxpayer and the taxpayer says he got the notice.

The Court: I go along with that in cases where there is a dispute and the taxpayer says he never got the notice.

Mr. Hochman: My point is until he goes within the ninety days and says to the tax court I want in this court, he cannot say that he couldn't have gotten in because, as I said, the Commissioner cannot make that assessment.

The Court: Why should we argue it when you have not briefed the point and counsel presents it at the last minute? Let's put it over and do some work. I have plenty of cases where the lawyers brief the points. Why break my neck on cases where you don't brief.

Mr. Hochman: I am sure there is judicial review on this whole body of law and I think the point I make is well taken. Even if the Block case is law you still must have the exhaustion of administrative remedy. You still must have the tax court saying to the petitioner, Mr. Boren, you can't come into this court, and all that time the Commissioner cannot act until the tax court throws him out. The Commissioner is bound.

The Court: Maybe you are right but as I say I have cases which lawyers have briefed. I want to know what this is about. Now, how much time do you want? Want it to go over a week? Two weeks? A week should be enough, shouldn't it? Two weeks?

Mr. Hochman: Pardon me—let's see what——

The Court: You have two problems: One is treating this [20] as a motion for summary judgment. The plaintiff should have a right to make his showing under the rules that govern summary judgments, as to what issues of fact would prevent a summary judgment being granted. And you have not complied strictly with the rule about your set of proposed findings and judgment because you weren't treating it that way. That I am not too concerned with. Too, that rule doesn't help the court very much. I will waive any filing on your

part of the proposed findings and conclusions and judgment because they always have to be redrawn even if the motion is granted.

I would suggest that the plaintiff have an opportunity to make his showing in contradiction to the motion treated as a motion for summary judgment. You will reply again. Secondly, I would like to hear from you both on this point about registered mail and whether a cause for injunctive relief is stated, assuming your point of law is good.

Mr. Brant: You mean the government has assumed validity of the facts—for the purpose of this motion assumed the validity of the facts set forth in our complaint?

The Court: They would be entitled to do that.

Mr. Brant: At that time it was a motion to dismiss and I wonder now as to whether or not the government is willing to make that same assumption for the motion for summary judgment.

The Court: That is what they are able to do. They are entitled to look at your complaint and if you allege something [21] take that fact as being not in dispute.

Mr. Hochman: Conceivably this isn't a motion to dismiss. If the Court does this one thing I question—I know Mr. McHale had this affidavit drawn up in an abundance of caution. He is a good pleader. Within the complaint itself this penalty of fifty per cent is alleged—in Mr. Brant's complaint —exactly one-half fraud penalty. And I believe the entire statute of limitations is false and where that we——

The Court: I want to ask Mr. Brant—there

does not seem to be much dispute this assessment proceeding is a fraud assessment. Can you concede that?

Mr. Brant: No dispute that they are asserting fraud in the notice of proposed deficiency.

The Court: And are basing their assessment on fraud?

Mr. Brant: No dispute on that.

Mr. Hochman: Well then, we return actually to a motion to dismiss?

The Court: Well, except you have that only orally on the record. Can't you get a stipulation and file it with this document that you have as an exhibit to your motion to dismiss as the document that was sent.

Mr. Brant: I believe we can and also handle the other facts in the complaint, your Honor.

Mr. Hochman: That would I think——

The Court: All right. I will put it over two weeks and [22] see what you can find.

Mr. Hochman: Will we have Mr. Brant filing his opposition——

The Court: Mr. Brant, I want to hear from you first. The government filed quite a brief. It is your turn. By Tuesday the 24th file any memorandum you want to in support of this position on this registered mail. The government to file on or before the 30th, if you want to reply. The matter is continued to the 30th at two o'clock. [23]

Certificate

I, Bernice E. Cavin, hereby certify that I am a duly appointed, qualified and acting official court reporter pro tem of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at San Diego, California, this 8th day of May, A.D. 1956.

/s/ BERNICE E. CAVIN,
Official Reporter Pro Tem.

[Endorsed]: Filed July 13, 1956.

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## REPORTER'S TRANSCRIPT OF PROCEEDINGS

Monday, April 30, 1956—2:00 P.M.

The Court: Let's take up Boren versus Riddell.

The Clerk: Clifford O. Boren versus R. A. Riddell, 1822-SD-C, Motion to Dismiss and Motion for Change of Venue.

The Court: Those are both your motions, Mr. Hochman?

Mr. Hochman: Yes, except the Motion for Change of Venue has been waived and abandoned.

The Court: Withdrawn then?

Mr. Hochman: I was looking for a word, your Honor.

The Court: Let the record show the Motion for Change of Venue is withdrawn.

Now, I have read your briefs in the Boren case. Did you have anything else to present that you have not presented in the briefs?

Mr. Brant: There is only one comment that I would like to make and that concerns the Dolezilek versus Commissioner case, the case relied upon by the government in their brief. I would like to point out in connection with that case, that it is clearly distinguishable from the present case in that the notice of proposed deficiency was originally sent out by registered mail, properly addressed, and it has been held in other cases that where that is the case it doesn't matter whether the taxpayer ever received the notice at all, that the Commissioner has fulfilled his duty when he sends it by registered mail and is under no obligation to prove actual receipt of the notice.

The Court: They did not talk about that in the case, did they?

Mr. Brant: Yes, your Honor, they point out in the case that they did receive—it was sent out by registered mail properly addressed.

The Court: Did not talk about the authorities you referred to.

Mr. Brant: No, your Honor. They did not. The case in which that comment is made is Capone versus Larson, which is not officially reported but which appears in 19 A.F.T.R., American Federal

Tax Reports, page 1357.

The Court: Anything else you want to offer, Mr. Hochman?

Mr. Hochman: No, your Honor, I don't. This case, particularly with this dissent, it does discuss this problem and probably is on all fours with this case. The Court has made its own ruling and dealt with its own notice, physical delivery given to the taxpayer by the deputy collector. And I think it does discuss at great length this point of registered mail and notice to taxpayers.

The Court: I notice in your reply brief you discussed some of the cases relied upon by the plaintiff. You did not discuss the Heinemann case in the Third Circuit.

Mr. Hochman: It might be inadvertence. I thought I took all the appellate decisions. I might have missed one. I know I have read them all. [3*]

The Court: Heinemann Chemical Company, 92 Fed. Second 344. Now, he cited also another case in 92 Fed. Second, Van Antwerp versus U. S. But this Heinemann case in the Third Circuit cited and relied upon some of the Board of Tax Appeals decisions. However, in reading that case it leaves a good bit to be desired. The Court started out and talked about how the notice must be given by registered mail. They did not quote the language of the statute, namely, that notice by registered mail is authorized. They paraphrased it and took a rather big hurdle in an easy manner by saying it must be

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

and then quoted about registered mail and then when they came down to citing the Supreme Court case in Botany Mills they said: "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." Well, some more of compounding the evil. I did not read the statute as a limiting of the method in which a notice might be sent. If you read it that way, then maybe the Botany Mills case assists, but if the statute does not limit the method and instead authorizes the use of registered mail, it would seem to me it is a matter of logic and common sense that personal notice, whether given by ordinary mail, which is admittedly received, or given by personal service should be the equivalent of anything sent by registered mail. There is no magic in registered mail. The essential thing required is that the taxpayer have notice that a certain deficiency has been levied against him and he may [4] then decide what route he wants to go. Admittedly Boren had notice on April the 14th. Then in insurance law you have provisions that policies may be terminated by registered mail. And there are cases which hold that even though the policies say that you may terminate the policy by registered mail, actual notice is the equivalent of the registered mail. As a matter of fact, in logic actual notice is better than registered mail because registered mail might not get there, even though there is the presumption that a letter registered will arrive, there is such a thing as letters being lost. And if you cite cases to the effect that—you called my attention to cases. I don't

think you cited them here—that the mailing of the notice by registered mail is legally sufficient even if not delivered. Well, certainly there could be no better notice than actual notice. Now then, the question comes down to whether the Congress intended that that was the only way to notify a man of a deficiency. The statute says the Commissioner is authorized to use registered mail. You would have to spell the word "authorization" to mean something that was not permissive but that is the only way it could be done.

I am not unmindful of the decisions of the Tax Court but I think the government has the better side of the argument and I am going to deny the—going to grant the motion, not as a motion to dismiss but as a motion for summary judgment, in [5] view of the fact that matters outside the record were presented here and are conceded to be true, the government to draw findings of fact and conclusions of law and a judgment within ten days.

Mr. Hochman: That will be fine, your Honor.

The Court: This is an appealable order, I take it?

Mr. Brant: Yes, your Honor. And in that connection I should like at this time to move for an injunction pending appeal under Rule 62(c) for if we pay this tax at this time or if the Collector proceeds to collect the tax then the question on appeal becomes moot. According to my understanding of the decisions where an injunctive relief has been requested if the tax is paid or collected the matter would become moot and we would no longer have

the right to appeal. I think there is no question in counsel's mind about the ability of the taxpayer to pay the assessment, and I have discussed it with him. It is purely a matter of setting it up in some way so that we will have our right of appeal.

The Court: I do not think your motion is timely unless you want me to indicate what I will do when the proper time comes.

Mr. Brant: I appreciate that, your Honor. I realize it is not timely that no judgment has been entered and we have no notice of appeal in. I wanted to bring it up at this point so it wouldn't be necessary for Mr. Hochman to again come down for that purpose. [6]

The Court: Will the government have any opposition to that?

Mr. Hochman: I am not too familiar, your Honor, with Rule 62(c). Mr. Brant did mention that to me. I raised that as a matter of fact with him just before court——

The Court: Well, unless the government—I think the rule covers the situation. It refers specifically to an order refusing an injunction and provides when an appeal is taken from an interlocutory or final judgment denying an injunction the Court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal on such terms as to bond or otherwise as it may consider proper.

Now, has there been any injunction in force up to this time or has the government merely not pro-

ceeded with distress because they knew this action was pending?

Mr. Brant: The latter course is the one that has been followed. No injunction has been sought up to this point because I was informed by the Collector down here they would not proceed until the matter was decided.

The Court: Maybe the Collector will so inform you again on an appeal. I think what you had better do is to make your application after this is entered and confer with the U. S. Attorney. If there is any prejudice, certainly I will require a bond. I do not know the amount of this tax deficiency. I do [7] not know the status of this defendant. If he is good for this amount, it might be one thing. If there is any question then a bond should be posted. The litigant should have a right to test out this decision if he wants to do that.

Mr. Hochman: I will check, your Honor. I can assure counsel the Collector's office here will not move until they hear from us and we assured him we wouldn't do anything——

The Court: All counsel wants is assurance that this man's cats and dogs and bank accounts will not be grabbed pending this appeal and for some reasonable time after a decision. You may work out something that satisfies him, otherwise he could present a motion and you could submit it without argument or whatever you want to do. I would be inclined, unless a good showing is made by the government, to grant the motion.

Mr. Hochman: Fine, your Honor. What we will

do for the present is assure counsel until a judgment is entered in this case nothing will be done or until the motion is made to your Honor.

The Court: All right.

Mr. Brant: Thank you, your Honor.

The Court: Meanwhile your conclusions of law have to cover the other point briefed at the prior hearing as well as this point.

Mr. Hochman: Statute of limitations?

The Court: Statute of limitations question which was [8] pretty well disposed of by the government's brief but the summary judgment to cover both aspects of the case by your findings and conclusions.

Mr. Hochman: We will do so, your Honor.

Mr. Brant: Thank you, your Honor. [9]

Certificate

I, Bernice E. Cavin, hereby certify that I am a duly appointed, qualified and acting official court reporter pro tem of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at San Diego, California, this 8th day of May, A.D. 1956.

/s/ BERNICE E. CAVIN,
Official Reporter Pro Tem.

[Endorsed]: Filed July 13, 1956.

[Title of District Court and Cause.]

## CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 41, inclusive, contain the original

Complaint;

Notice of Motions and Motions to Dismiss together with Memorandum in Support thereof and Exhibit "A";

Memorandum in Opposition to Motion to Dismiss;

Defendant's Reply Memorandum;

Findings of Fact, Conclusions of Law and Judgment;

Notice of Appeal;

Notice of Motion for Injunction Pending Appeal;

Designation of Contents of Record on Appeal;

which, together with a full, true and correct copy of the Minutes of the Court had on April 17, 1956, April 30, 1956, and June 18, 1956, and 2 volumes of Reporter's Transcript of Proceedings had on April 17, 1956, and April 30, 1956, all in the above-entitled cause, constitute the Transcript of Record on Appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the

foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 16th day of July, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ CHARLES E. JONES,
Deputy.

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[Endorsed]: No. 15203. United States Court of Appeals for the Ninth Circuit. Clifford O. Boren, Appellant, vs. R. A. Riddell, District Director of Internal Revenue, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed July 17, 1956.

Docketed July 23, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 15203

CLIFFORD O. BOREN,

Appellant,

vs.

R. A. RIDDELL,

Appellee.

## STATEMENT OF POINTS ON APPEAL

Appellant herewith presents points on which he claims the District Court erred:

1. The Court erred in holding that the Notice of Deficiency mailed to Appellant by ordinary mail was a proper Notice of Deficiency under the provisions of Section 272(a)(1) of the Internal Revenue Code of 1939.

2. The Court erred in holding that the assessment of income taxes, penalties and interest by the Commissioner of Internal Revenue was lawful and proper and the enforcement or collection of said assessment cannot be enjoined.

3. The Court erred in holding that Appellant had failed to exhaust his administrative remedies in that no petition for a redetermination of the deficiency, together with the penalties and interest involved, was filed with the Tax Court of the United States within 90 days after the mailing by ordinary mail of said Notice of Deficiency.

4. The Court erred in holding that Appellee was entitled to judgment that the complaint be dismissed with prejudice, that the injunction be denied and that the Appellee have his costs.

Dated: July 23, 1956.

TORRANCE & WANSLEY,

By /s/ JOHN A. BRANT,
Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed July 24, 1956.